Supreme Court, U. S.
FILED
JAN 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1076

HARRY A. SKYDELL and ARNOLD DUTCHEN,

Petitioners,

—against—

ECOLOGICAL SCIENCE CORPORATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 6

REASONS FOR GRANTING THE WRIT:

POINT I

The decision of the Court of Appeals sanctions private settlements and the sale of rights of appeal by named plaintiffs in a class, at the expense of class members, in breach of plaintiffs' fiduciary duties and contrary to a decision of this Court .. 9

POINT II

By refusing to review the district court's denial of class action status, the Court of Appeals held that interlocutory orders which affect the final determination are not reviewable upon an appeal from a final determination, a gross departure from the accepted and usual course of judicial proceedings .. 13

PAGE

POINT III

By refusing to consider that the district court approved a dismissal of a derivative action, in violation of FRCP 23.1, on the grounds that the issue had not been raised in the lower court, the decision of the Court of Appeals is in conflict with other circuits and other decisions of the Fifth Circuit, and creates a miscarriage of justice by its gross departure from the accepted and usual course of judicial proceedings 15

POINT IV

By affirming the stipulation procured through misrepresentations and without the occurrence of a condition expressed therein, the decision of the Court of Appeals has decided basic contractual issues in conflict with state law 17

CONCLUSION 18

APPENDIX A 1a

APPENDIX B 10a

APPENDIX C 14a

APPENDIX D 15a

TABLE OF AUTHORITIES

PAGE

Cases:

Atchison T&SF Railroad Co. v. *Jackson*, 235 F.2d 390 14

Benson v. *U.S.*, 112 F.2d 422 (5th Cir. 1940) 16
Boire v. *Miami Herald Publishing Company*, 343 F.2d 17 (5th Cir.), *cert. denied* 382 U.S. 824 (1965) 16
Boufford v. *U.S.*, 239 F.2d 841 (1st Cir. 1956) 16

Certain-Teed Products Corp. v. *Topping*, 171 F.2d 241 (2nd Cir. 1948) 11
Chicago B&QR Co. v. *City of North Kansas City Missouri*, 276 F.2d 932 (8th Cir. 1960) 16
Craftsman Financial & Mortgage Co. v. *Brown*, 64 F. Supp. 168 (S.D.N.Y. 1945) 11

Fleming v. *Goodwin*, 165 F.2d 334 (8th Cir. 1948), *cert. denied* 334 U.S. 828 16

Gomila v. *U.S.*, 146 F.2d 372 (5th Cir. 1944) 16

Miller v. *Steinbach*, 268 F.2d 255 (S.D.N.Y. 1967) 11
Mulligan v. *Andrews*, 211 F.2d 28 (D.C. Cir. 1954) 16

Nello v. *John B. Kelly, Inc.*, 283 F.2d 96 (3rd Cir. 1960) 15-16

Petty v. *Porter*, 322 F.2d 308 (6th Cir.), *cert. denied*, 377 U.S. 849 (1963) 16

Skirvin v. *Mesta*, 141 F.2d 668 (10th Cir. 1944) 14

Trussell v. *U.S.*, 278 F.2d 478 (6th Cir. 1960) 16

PAGE

U.S. v. *353 Cases Mountain Val. Mineral Water*, 247 F.2d 473 (8th Cir. 1957) 16

Western Union Telegraph v. *United States Mexican & Trust Co.*, 221 F. 545 (8th Cir. 1915) 14

Other Authorities:

Haudek, *Settlement and Dismissal of Stockholders' Actions*, 22 S.W.L.J. 767 (1968) & 23 S.W.L.J. 765 (1969) 10-11

Corbin on Contracts, Section 6 (1 Vol. Ed.) 17

Simpson on Contracts, Section 7 (2nd Edition) 17

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HARRY A. SKYDELL and ARNOLD DUTCHEN,

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—against—

ECOLOGICAL SCIENCE CORPORATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of *certiorari* issue to review the judgment entered on October 31, 1975, by the United States Court of Appeals for the Fifth Circuit, which judgment affirmed a judgment of the United States District Court for the Southern District of Florida dismissing a consolidated action which was commenced as a class action under Rule 23 of the Federal Rules of Civil Procedure for alleged violations of the federal securities laws. The dismissal was based on a purported stipulation of settlement which provided for the voluntary withdrawal of a petition for certiorari, seeking review of a denial of class action certification, in return for a pay-off to the named plaintiffs.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, filed October 31, 1975, has been officially reported as *Carl M. Pearson, et al.,* plaintiffs v. *Harry A. Skydell and Arnold Dutchen,* plaintiffs-appellants v. *Ecological Science Corporation, et al.,* defendants-appellees, 522 F.2d 171. A copy thereof is set forth in Appendix "A" hereto. There was no opinion of the United States District Court for the Southern District of Florida upon which its judgment of dismissal was based, but its findings were set forth in an order dated March 28, 1974 which is set forth in Appendix "B" hereto. The district court's judgment of dismissal is set forth in Appendix "C" hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on October 31, 1975. Petitioners herein timely petitioned to the Court of Appeals for the Fifth Circuit for a rehearing *en banc,* which petition was denied by Order dated December 24, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether named plaintiffs, in an action brought by them as a class action, can validly discontinue the action during a pending appeal from a denial of class action certification, thereby sacrificing the rights of the class, in exchange for a private pay-off.

2. Whether it is necessary to review the propriety of an interlocutory order denying class action status, upon appellate review of a final order, dismissing the action, which could not possibly have been proper if class action status had been granted because the dismissal did not provide notice or benefit to the members of the class as required in class actions by Rule 23(e) of the Federal Rules of Civil Procedure.

3. Whether a judgment dismissing a derivative action, without notice or benefit to the shareholders, in violation of Rule 23.1 of the Federal Rules of Civil Procedure, may be permitted to stand upon Appellate review merely because the violation was not brought to the lower court's attention.

4. Whether a plaintiff's acceptance of a settlement of his claims is valid when he was induced to provide such acceptance by misrepresentations including, *inter alia,* a misrepresentation that his attorney was aware of and had approved of the settlement.

5. Whether a settlement is binding when it provides, as a condition precedent, that all plaintiffs must accept the settlement and three of the plaintiffs do not accept.

Statutes Involved

Rule 23(a) of the Federal Rules of Civil Procedure provides:

> "*Prerequisites to a Class Action*: One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2)

there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Rule 23(b)(3) of the Federal Rules of Civil Procedure provides:

"*Class Actions Maintainable*: An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Rule 23(c)(1) of the Federal Rules of Civil Procedure provides:

"As soon as practicable after commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order

under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

Rule 23(e) of the Federal Rules of Civil Procedure provides:

"*Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

Rule 23.1 of the Federal Rules of Civil Procedure provides in relevant part:

"*Derivative Actions Brought by Shareholders* . . . The [derivative] action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

Federal securities laws involved in this case are §§27 and 10b of the Securities Exchange Act of 1934 (15 U.S.C. 78aa and 78 jb); SEC Rule 10b-5 (17 C.F.R. 240.10b-5); §§22(a), 15 and 17(a) of the Securities Act of 1933 (15 U.S.C. 77 v(a), o and q(a)); §§13(a), 14(a) and 20 of the Securities Exchange Act of 1934 (15 U.S.C. 78m(a), n(a) and t); and SEC Rules 13a-1, 13a-11 and 13a-13 (17 C.F.R. 240.13a-1, -11 and -13). These are set forth in Appendix "D" hereto.

Statement of the Case

The action is a consolidation of sixteen class actions commenced throughout the United States by purchasers of common stock of Ecological Science Corporation ("Ecological"), a publicly held corporation. The plaintiffs allege a conspiracy by the defendants to manipulate and artificially inflate the price of the common stock of Ecological in violation of the federal securities laws.* The action also includes a derivative claim by plaintiffs for violations of the securities laws* involving misappropriations by the defendants (other than Ecological) of valuable subsidiaries of Ecological (A** 76-78). The jurisdiction of the district court was invoked because federal statutes were involved, including the Securities Exchange Act of 1934 which provides for exclusive federal jurisdiction, and diversity was claimed as to some of the plaintiffs. In addition jurisdiction was based upon the principles of pendent jurisdiction.

The district court denied class action status even though: (1) the defendants had admitted in prior proceedings that "there is no escape from having the [consolidated action] proceed as a class action" (A 53); (2) the district court had indicated in prior orders that the litigation would proceed as a class action (A 4); and (3) at the hearing on the class action motion, the district court noted that all defendants had previously agreed to class certification (A 171). Co-lead counsel for plaintiffs ("co-lead counsel") appealed the denial of class status to the United States Court of Appeals for the Fifth Circuit (the "Court of Appeals"). That appeal was dismissed solely on the

* The federal securities laws involved are cited on page 5 hereof.

** "A" Refers to the Appendix on Appeal in the Fifth Circuit.

grounds that the denial of class status was not a final order, and co-lead counsel petitioned for *certiorari*. Throughout the litigation on the class action motion, co-lead counsel vigorously pressed that this is a classic case for granting class action status.

While the petition for *certiorari* was pending, co-lead counsel inexplicably entered into a stipulation of settlement with the defendants pursuant to which the *named* plaintiffs and intervenors would obtain a 100% recovery of their claims and the unnamed members of the class would receive nothing.* The stipulation also provided that the petition for *certiorari* would be withdrawn, rendering the settlement, in effect, a sale by named plaintiffs of the right to appeal from an adverse class status decision in consideration of a private settlement for their benefit at the expense of the class.

Upon the filing of the stipulation, the district court took an action unparalleled in the history of Federal class actions: it approved the settlement, dismissing the action with prejudice, but sealed the stipulation so that no one but the parties knew its terms. Moreover, the stipulation itself contained a highly unusual term—it provided for the *removal of most of the documents from the court file, and for the sealing of the remainder of the file.* The district court provided no notice of the dismissal to the members of the class, and no notice to shareholders of the dismissal of the derivative claim as required under FRCP 23.1.

Although the order appointing co-lead counsel required them to enter into stipulations "subject to consultation by

* While less than 100 claimants were made whole, 16,000 members of the class were abandoned by this maneuver.

them with additional counsel representing specific plaintiffs," co-lead counsel wrote directly to the Petitioners for their consent to the stipulation of settlement without first discussing the matter with their attorneys and without their attorneys' knowledge. The Petitioners consented to the stipulation only because they were misled by co-lead counsel into the erroneous belief that their individual attorneys knew and approved of the settlement, and because of numerous other gross misrepresentations contained in the presentation of the settlement sent to them by co-lead counsel. In fact, the appellants' individual attorneys knew nothing of the settlement until after it was consented to by the appellants, and advised their clients that the settlement was improper promptly after learning of it. Petitioners then sought to revoke their consents to the stipulation and appealed to the Court of Appeals from orders of the district court enforcing the stipulation and dismissing the action (A 51, A 161-62, A 186, A 185, A 211, A 190).

The stipulation of settlement expressly provided that it was subject to the granting of consent thereto by all of the individual plaintiffs. However, no consent whatsoever was obtained from three of the plaintiffs (Frederick Marks, Leonard Shwade and Esther Schwade). Because of co-lead counsels' desire to terminate the action, on February 22, 1974 they purported to entirely waive the condition of obtaining authority, with respect to those plaintiffs, and thereby materially altered the terms of the stipulation. The "consents" from the Petitioners, however, had been returned prior to such material alteration and, therefore, could not have been consents to the stipulation as subsequently altered (A 180, A 217).

The Court of Appeals affirmed the judgment of the district court. It recognized no wrong in what Petitioners submit is a private sale of appeal rights from an adverse class determination, refused to consider that the action contained a derivative claim which was settled with no notice to the shareholders and no benefit to the corporation, refused to review the denial of class status solely because the dismissal order was affirmed, and honored the stipulation even though the Petitioners consent had been obtained through misrepresentations and consents of other plaintiffs had not been obtained at all.

The issues involved are sufficiently important to have drawn the Securities and Exchange Commission ("SEC") into the case as *amicus curiae*. The SEC submitted a brief and a reply brief supporting the Petitioners, and a brief in support of Petitioners' motion for a rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

POINT I

The decision of the Court of Appeals sanctions private settlements and the sale of rights of appeal by named plaintiffs in a class, at the expense of class members, in breach of plaintiffs' fiduciary duties and contrary to a decision of this Court.

The panel attempted to explain away the applicable Supreme Court decision, *Young* v. *Higbee Co.*, 324 U.S. 204 (1944). We submit that this was a fundamental error, on an important question of federal law, which is in conflict with this Court's prior decision.

In *Young,* the Supreme Court outlawed the sale by named plaintiffs of the right to appeal from what amounted to an adverse class decision. There, plaintiffs who represented a class, but who settled for their own benefit and dismissed their appeal on behalf of the class, were liable to the class. The Court held that, by availing themselves of the privilege of litigating for a class, the named parties had assumed the duty to represent the rights of the class fairly and in good faith and to refrain from trading in the rights of others for their own private benefit.

In *Young,* the plaintiffs were two preferred shareholders appealing from the district court's approval of a bankruptcy reorganization plan which failed to subordinate a debt claim to the rights of the preferred class. The Court of Appeals, in seeking to distinguish *Young,* stated that *Young* is not applicable to conventional class actions, but only where the class members are bound to the decision under the principles of *res judicata* (522 F.2d at 178) (8a).* However, this is contrary to what the Supreme Court actually suggested in *Young.*

The leading article on settlement of stockholders' actions, Haudek, *Settlement and Dismissal of Stockholders' Action,* 22 S.W.L.J. 767, 788-9 (1968) and 23 S.W.L.J. 765 (1969), correctly states that the Supreme Court intended the *Young* doctrine to apply to conventional class suits, i.e., where the dismissal is *not res judicata* upon the class (235 S.W.L.J. at 817). In support, Haudek cites footnote 10 of the *Young* decision, 324 U.S. at 204, which refers to articles by McLaughlin and Hornstein as dealing with "the same general topic," notwithstanding that such articles deal with stock-

* "a" refers to the appendix hereto.

holders' private settlements in conventional class suits where *res judicata* is not a factor. Haudek further states that this application is now beyond doubt, citing *Certain-Teed Prods. Corp.* v. *Topping,* 171 F.2d 241 (2nd Cir. 1948); *Miller* v. *Steinbach,* 268 F. Supp. 255, 281-83 (S.D. N.Y. 1967); *Craftsman Fin & Mortgage Co.* v. *Brown,* 64 F. Supp. 168, 178 (S.D.N.Y. 1945) (dictum). Indeed, a finding that the named plaintiffs cannot sell the right to appeal is even more imperative in the instant action, where the plaintiffs initiated the action in behalf of a class, than in *Young* where the plaintiffs initiated the action only in their own names.

The Court of Appeals was particularly concerned that settlement of non-class actions would be hobbled by adoption of appellants' position; it stated:

> "The rule which appellants ask this court to adopt would require that in every action in which class action certification is denied by a district court, the named plaintiffs would be precluded from executing a settlement of their individual claims, and would be required to litigate through appellate review of the interlocutory order denying class action certification after final judgment in the trial court" (522 F.2d at 177) (7a).

However, the rule sought by the Petitioners would not require litigants in a class action to appeal every denial of class action status, but would restrain plaintiffs from *discontinuing an appeal they had already commenced,* upon a settlement which provides them a full recovery at the expense of the class. It is the sale of rights of an appeal already commenced that was precluded by the Supreme

Court in *Young Higbee,* and it is the sale of such rights which the Petitioners sought to prevent herein but which was sanctioned by the Court of Appeals.

The Court of Appeals also stated that the members of the class would not be prejudiced because they could commence their own actions despite the dismissals of the instant action (522 F.2d at 178) (8a). This is simply not correct. Any party commencing a new action would face the obstacle of defenses based upon the statute of limitations and upon laches which, if not absolutely insurmountable, would at least burden the plaintiff with serious issues not present in the instant action. Although the Court of Appeals stated that recent decisions by the Supreme Court indicate that *"at least in certain situations"* the commencement of a class action tolls the applicable statute of limitations (522 F.2d at 178) (8a), the applicability of such cases to the instant situation is far from clear. A plaintiff in a new action would have the burden of showing that the toll applies in his situation, and would have to face threshold litigation pertaining to the statute of limitations. In any event, these recent cases do not even address the defense of laches. Moreover, as pointed out by the SEC, in its brief, the class members are not receiving notice of the dismissal and many will, therefore, be unaware of the need to commence an action for themselves. In addition, the enormously expensive discovery heretofore had in this action will have to be repeated in any new action. Finally, the additional time might permit the dissipation of defendants' assets and hamper collection of any judgment against them, and might cause a lapse of any available insurance coverage.

If the Court of Appeals' decision is allowed to stand, the Fifth Circuit will have paved the way for the frequent and common occurrence of private settlements between parties in class actions which would (1) permit corporate fiduciaries to pay but a relatively nominal sum for violations of their fiduciary duty, and (2) make a complete mockery of the requirement that members of a class have adequate representation. Because of the impact that the occurrence of such private settlements would have on the business and investment communities, and because of the failure to follow the teachings of *Young* v. *Higbee,* Petitioners respectfully urge that *certiorari* be granted.

POINT II

By refusing to review the district court's denial of class action status, the Court of Appeals held that interlocutory orders which affect the final determination are not reviewable upon an appeal from a final determination, a gross departure from the accepted and usual course of judicial proceedings.

The Court of Appeals refused to review the denial of class action status despite the fact that this is an appeal from a final judgment. It stated that it was "unnecessary to determine the propriety of the class denial inasmuch as we affirm the order of the district court enforcing the settlement and dismissing the action" (522 F.2d at 179) (9a). However, the district court's denial of class action status *necessarily* affected the validity of the judgment dismissing the action. Had class status been granted, instead of denied, the dismissal judgment would never have been allowed to stand because it would have dismissed a proper class

action without any notice or benefit to the members of the class in violation of Rule 23(e) of the Federal Rules of Civil Procedure. Moreover, upon earlier appeal, immediately following denial of class action status, the Court of Appeals had ruled the order was interlocutory and not then appealable. Now, however, it has ruled that the order cannot be reviewed upon a review of the final determination. These two refusals to review class status determination leads to one conclusion: class action status will not be reviewed in the Fifth Circuit—a fundamental departure from the accepted and usual course of proceedings and a violation of the Federal Rules of Civil Procedure.

Before this decision, it has always been held that interlocutory orders, which were not immediately appealable, and which affected the final determination, were reviewable upon an appeal from a final decision. *Atchison T&SF Ry. Co.* v. *Jackson,* 235 F.2d 390; *Skirvin* v. *Mesta,* 141 F.2d 668, 671 (10th Cir. 1944); *Western Union Telegraph* v. *United States & Mexican Trust Co.,* 221 F. 545, 551 (8th Cir. 1915). The Court of Appeals' decision, contrary to the decisions of the other circuits, has made appellate review of an adverse class status determination impossible to be had at anytime. It has held that an interlocutory order is not reviewable immediately or upon an appeal from the final determination even when the interlocutory order directly affects the validity of that final determination.

POINT III

By refusing to consider that the district court approved a dismissal of a derivative action, in violation of FRCP 23.1, on the grounds that the issue had not been raised in the lower court, the decision of the Court of Appeals is in conflict with other circuits and other decisions of the Fifth Circuit, and creates a miscarriage of justice by its gross departure from the accepted and usual course of judicial proceedings.

The Court of Appeals refused to recognize that the district court approved a dismissal of a derivative action (which provided no benefit to the corporation) without notice to the corporation's shareholders in clear violation of Rule 23.1 of the Federal Rules of Civil Procedure. The Court of Appeals reasoned that the issue had not been raised in the court below (522 F.2d at 179) (9a). Yet, the dismissal involved (1) a gross miscarriage of justice, (2) a clear error on the face of the pleadings and record, and (3) no factual dispute. Under these circumstances, the Court of Appeals has departed from the settled rule of its Circuit and other circuits.

By permitting a dismissal of a derivative action with no benefit to the corporation, and no notice to its public shareholders, a gross miscarriage of justice was done in violation of the policy set forth in the securities laws and in the notice provision of Rule 23.1 of the Federal Rules of Civil Procedure. Appellate courts have consistently considered errors where such gross miscarriages of justice result, regardless of whether the error was raised in the court below. *Nello* v. *John B. Kelly, Inc.,* 283 F.2d 96, 101

(3rd Cir. 1960); *Boufford* v. *U.S.*, 239 F.2d 841, 842 (1st Cir. 1956); *Mulligan* v. *Andrews*, 211 F.2d 28, 29 (D.C. Cir. 1954); *U.S.* v. *353 Cases Mountain Val. Mineral Water*, 247 F.2d 473, 477 (8th Cir. 1957); *Fleming* v. *Goodwin*, 165 F.2d 334, 337 (8th Cir. 1948), *cert. denied*, 334 U.S. 828; *Chicago, B&QR. Co.* v. *City of North Kansas City, Mo.*, 276 F.2d 932, 939 (8th Cir. 1960); *Petty* v. *Porter*, 322 F.2d 308, 311 (6th Cir.), *cert. denied*, 377 U.S. 948 (1963).

Where the lower court's error is obvious and clear from the face of the pleadings or record, appellate courts, including the Fifth Circuit, have corrected the error although not raised below. *Benson* v. *U.S.*, 112 F.2d 422, 423 (5th Cir. 1940); *Boire* v. *Miami Herald Publishing Company*, 343 F.2d 17, 25 (5th Cir.), *cert. denied* 382 U.S. 824 (1965); *Gomila* v. *U.S.*, 146 F.2d 372, 376 (5th Cir. 1944); *U.S.* v. *Kadison*, 145 F.2d 525, 526 (7th Cir. 1944); *Trussell* v. *U.S.*, 278 F.2d 478, 480 (6th Cir. 1960). In *Boire*, the Fifth Circuit held that where the record did not present questions involving resolutions of any factual disputes and the error was clear, the appellate court would examine the question even though the district court had not considered it. In the instant action, the error is clear, involves no factual disputes and is indisputable on the face of the record. It is not open to question that notice required by Rule 23.1 of the Federal Rules of Civil Procedure was not given, and that a derivative claim was involved.

In refusing to consider the error made by the district court in dismissing the derivative action in violation of Rule 23.1, the Fifth Circuit stands alone in the promulgation of a rigid doctrine that issues not raised below will *never* be heard upon appeal no matter what the circumstances.

POINT IV

By affirming the stipulation procured through misrepresentations and without the occurrence of a condition expressed therein, the decision of the Court of Appeals has decided basic contractual issues in conflict with state law.

It is an elementary rule of the law of contracts that any acceptance of an offer, induced by fraud or misrepresentation in representing the material terms of the offer, is void or voidable (Corbin on Contracts, §6 (1 Volume ed.); Simpson on Contracts, §7 (2nd Edition). Co-lead counsel obtained the consents of the petitioners to the stipulation through blatant misrepresentations by falsely implying that their attorneys had knowledge of and had approved the settlement. Letters from co-lead counsel to petitioners, requesting their consent, stated that their attorneys would participate in a specific fee, thereby indicating that they had previously agreed to such participation and had been kept abreast of settlement developments (A 185, A 194). The letters also indicated that carbon copies thereof were being sent to their attorneys making it appear that they had been previously consulted (A 195). However, delivery of the copies to petitioners' attorneys had been delayed and were not received until after the consents were procured.

The letters to the petitioners seeking their consent contained further misrepresentations relied upon by the petitioners in granting their consent (A 188-190). In view of the foregoing, the petitioners' consents were procured through material misrepresentations and, thus, their revocations were effective and the stipulation failed.

Although it was not contested that three plaintiffs besides the petitioners had not consented to the stipulation, and that the stipulation expressly required that all of the plaintiffs consent as a condition precedent thereto, co-lead counsel purported to waive the requirement of obtaining the consent of those plaintiffs whose consents had not been obtained. However, if by this unilateral act, co-lead counsel did effectively waive the necessity of obtaining three missing consents, they materially altered the terms of the stipulation, i.e., by changing the requirement that consent from all of the plaintiffs and intervenors be obtained. The consents from petitioners, however, were procured prior to such waiver and, therefore, were to the unaltered stipulation and could not have been effective as an acceptance of the subsequently altered version that did not require all consents.

CONCLUSION

For the reasons set forth above, petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit.

Dated: January 28, 1976

Respectfully submitted,

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APPENDICES

APPENDIX A

Carl M. PEARSON et al., Plaintiffs,

v.

Harry A. Seydell and Arnold Betchen, Plaintiffs-Appellants,

v.

ECOLOGICAL SCIENCE CORP. et al., Defendants-Appellees.

No. 74-2175.

United States Court of Appeals, Fifth Circuit.

Oct. 31, 1975.

Two of 99 original and intervening plaintiffs in 16 consolidated securities fraud actions sought to overturn orders enforcing a stipulation of settlement entered by the United States District Court for the Southern District of Florida, at Miami, Peter T. Fay, J., and to have the settlement declared void. The Court of Appeals, Simpson, Circuit Judge, held that (1) the district court's findings of fact in support of its order enforcing the terms of the settlement were not clearly erroneous, (2) where a court has ruled that an action cannot properly be maintained as a class action, the notice requirements of the federal class action rule do not apply, at least where the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court, (3) the named original plaintiffs and intervenors breached no fiduciary duty to absent members of the alleged class in consummating the settlement agreement in exchange for the voluntary dismissal of a petition for writ of certiorari contesting the denial of class action certification, and (4) since individuals who were not parties to the litigation were not directly affected by the dismissal of the certiorari petition, appellants' reliance on the Supreme Court's "Young" decision was misplaced.

Affirmed.

1. Compromise and Settlement ⇐2

Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.

2. Courts ⇐406.3(21)

In considering the validity of district court's findings of fact contained in order enforcing the terms of stipulation of settlement, Court of Appeals was governed by the "clearly erroneous" standard; the applicable test was not simply whether the Court would have found otherwise but whether the district court could permissibly find as it did. Fed. Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

3. Courts ⇐406.3(21)

District court's findings of fact in support of its order enforcing the terms of stipulation of settlement were not "clearly erroneous." Fed.Rules Civ.Proc. rule 52(a), 28 U.S.C.A.

4. Compromise and Settlement ⇐21

Since material facts concerning the existence of an agreement to settle were in dispute, the district court followed approved procedure in holding a plenary hearing to determine the enforceability of the settlement agreement, rather than summarily enforcing it.

5. Federal Civil Procedure ⇐1698

The special prophylactic function of subdivision of the federal class action rule pertaining to court approval of dismissal and compromise is to assure that any person whose rights would be affected by a dismissal or compromise has the opportunity to contest the proposed action. Fed.Rules Civ.Proc. rule 23(e), 28 U.S.C.A.

6. Federal Civil Procedure ⇐1698

Where a court has ruled, under the federal class action rule, that an action cannot properly be maintained as a class action, the notice requirement of the rule's dismissal or compromise provision do not apply, at least where the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court. Fed. Rules Civ.Proc. rule 23(c)(1), (e), 28 U.S.C.A.

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7. Federal Civil Procedure ⇐1699

Named original plaintiffs and intervenors breached no fiduciary duty to absent members of alleged class in consummating settlement agreement in exchange for the voluntary dismissal of petition for writ of certiorari contesting the denial of class action certification. Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.

8. Limitation of Actions ⇐126

At least in certain situations, the commencement of a class action tolls the applicable statute of limitations as to all members of the class, until the determination of the propriety of maintaining the action as a class action is made by the trial court; furthermore, in the instant case, the motion for class action certification was denied on March 13, 1973, and the stipulation of settlement was entered into on February 22, 1974, meaning that any party who failed to seek intervention between those dates could blame no one but himself if his action was now barred. Fed.Rules Civ. Proc. rule 23, 28 U.S.C.A.

9. Federal Civil Procedure ⇐161

Where individuals who were not parties to the litigation were not directly affected by the dismissal, pursuant to settlement agreement, of petition for certiorari challenging the denial of class action certification, any reliance on the Supreme Court's "Young" decision was misplaced.

10. Appeal and Error ⇐172(1)
Courts ⇐522

Appellants' failure to raise the dismissal of derivative claim as a ground for invalidating settlement agreement in the district court precluded them from raising it in the Court of Appeals; furthermore, an action had been commenced in the Southern District of New York containing a derivative claim identical to the one alleged in the consolidated complaint in the instant action, and that new action would thus protect the rights, if any, of the corporation. Fed.Rules Civ. Proc. rule 23.1, 28 U.S.C.A.

Michael P. Fuchs, Stuart D. Wechsler, New York City, for Skydell.

Dermot G. Foley, New York City, for Dutchen.

James H. Schropp, David Ferber, Richard E. Nathan, Securities and Exchange Commission, Washington, D. C., for amicus curiae.

Stuart A. Summit, Gerard A. Dupuis, New York City, Miller Walton, Roy B. Gonas, Gaston, Snow, Motley & Holt, Boston, Mass., Metzenbaum, Gaines, Finley & Stern, Cleveland, Ohio, Koeppel, Stark, Marks & Newmark, Miami, Fla., for Ecological.

Sidney M. Aronovitz, Paige & Catlin, H. James Catlin, Jr., Miami, Fla., for Auerbach and others.

Thomas H. Seymour, Miami, Fla., for Co-Lead Counsel.

James W. Beasley, Jr., Miami, Fla., for Fabian, Grosh & Vollbrecht.

Reginald L. Williams, Miami, Fla., Michael A. Cooper, Richard G. Lyon, New York City, for Haskins & Sells.

Aubrey V. Kendall, Miami, Fla., for Essex Fund, Inc. & Salem Fund Inc.

Russo, Dubin & Goldberg, Michael H. Goldberg, New York City, for Cantor & Carter.

Appeals from the United States District Court for the Southern District of Florida.

Before BELL, DYER and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

Appellants Harry Skydell and Arnold Dutchen, two of ninety-nine original and intervening plaintiffs in sixteen consolidated actions, seek to overturn two orders enforcing a stipulation of settlement entered by the district court, and to have the settlement declared void. We affirm, finding no error in the actions or orders of the district court.

The basis of this litigation consists of sixteen actions commenced in 1971 and 1972, against Ecological Science Corporation (Ecological), and certain of its officers, directors, subsidiaries, and its accountants Haskins & Sells. Five of these actions were commenced in the Southern District of Florida, and eleven were transferred to that district pursuant to Title 28, U.S.C., Sec. 1404(a). Fifteen of the actions alleged individual and class action claims against some or all of the defendants. On March 20, 1972, the district court consolidated the sixteen actions, appointed the firms of Kelly, Black, Black & Kenny and Koeppel, Stark, Marks & Newmark as co-lead counsel (hereinafter co-lead counsel),[1] and directed that a consolidated amended complaint be filed by co-lead counsel setting forth all claims possessed by all plaintiffs in "whatever capacity". In delineating the authority of co-lead counsel to act on behalf of all plaintiffs the March 20, 1972, order provided:

> "All other pleadings, including but not limited to stipulations and the making of all opposition to any motion, shall likewise be initiated and conducted by co-lead counsel on behalf of all plaintiffs subject to consultation by them with additional counsel representing specific plaintiffs."

The March 20 consolidation order also enjoined all present and former stockholders of Ecological from instituting or prosecuting any action based on any claims alleged in the consolidated complaint except through intervention in the consolidated case.

The consolidated complaint pleaded eight separate claims on behalf of thirty-two named plaintiffs. Five of the eight claims were also asserted on behalf of the class of individuals who "purchased said [Ecological] stock during the period of November 27, 1967, to approximately May 26, 1971"; two of the other counts were asserted on behalf of differently described classes of Ecological stockholders.[2]

The district court on March 13, 1973, after oral argument and the filing of briefs by the parties, entered an order denying the plaintiffs' motion that their cause be certified as a class action. The plaintiffs appealed that order to this court, and on May 29, 1973, we granted the defendants' motion to dismiss the appeal for lack of jurisdiction. Plaintiffs then filed a petition for a writ of certiorari in the Supreme Court requesting that Court to review the jurisdiction of an appellate court to review an interlocutory denial of class action certification. The petition for certiorari did not and could not raise the merits of the district court's order denying class action status.

During the course of this interlocutory appeal extensive discovery was conducted in the district court, and that court granted motions to intervene in the consolidated action filed on behalf of sixty-seven individuals. The district court on November 16, 1973, set March 18, 1974 as the date for trial of the consolidated action. In setting the trial date the dis-

1. On February 17, 1972, the district court notified all counsel of record of a proposed order consolidating the sixteen actions, and appointing the Kelly firm and another Miami firm as co-lead counsel. Appellants, Skydell and Dutchen, through their New York counsel filed with the district court a motion supported by affidavits claiming that their interests would not be adequately protected unless their Miami counsel, the Koeppel firm, were appointed one of co-lead counsel. In its March 20, 1972, order the district court honored this request by appointing the Koeppel firm with the Kelly firm as co-lead counsel.

2. The first and primary count of the complaint alleged that the defendants had from November 1967 to May 1971, engaged in an unlawful conspiracy to manipulate and artificially inflate the price of the common stock of Ecological in violation of Section 10(b) of the Securities Exchange Act of 1934 and S.E.C. Rule 10b-5. Counts 2 through 5 pleaded claims under §§ 15 and 17(a) of the Securities Act of 1933; §§ 13(a), 14, and 20 of the Securities Exchange Act of 1934; and S.E.C. Rules 13a-1, 13a-11, and 13a-13. Count 6 asserted a common law negligence claim against Haskins & Sells, Ecological's auditors; Count 7 alleged a cause of action based on common law fraud against Ecological and two of its directors; and Count 8 alleged a derivative claim on behalf of Ecological against two of the corporation's directors and officers and two foreign affiliates of Ecological.

trict court made it clear to all parties that it intended to proceed with the trial on the scheduled trial date despite the pending petition for a writ of certiorari. At that point, and continuing for two months afterwards, co-lead counsel on behalf of the named plaintiffs and intervenors entered negotiations with defense counsel with the purpose of settling the litigation without the necessity of trial. These negotiations bore fruit on January 31, 1974, in the form of a stipulation of settlement which encompassed the claims of and was subject to ratification by the ninety-nine original and intervening plaintiffs. The stipulation of settlement dealt only with the claims of the ninety-nine named plaintiffs and did not purport to affect in any way the claims of other Ecological stockholders not involved in the litigation. Co-lead counsel wrote to each named plaintiff on February 9, 1974, setting out what in their opinion were the essential terms of the settlement, recommending approval of the settlement, and requesting that approval of the settlement be signified by each named plaintiff by signing and returning to co-lead counsel a copy of the letter.[3] On February 11, 1974, appellants, Skydell and Dutchen, both signified their ratification of the stipulation of settlement by signing and returning to co-lead counsel the copies of the letter sent to them. On February 22, 1974, co-lead counsel advised defense counsel in writing that they had been unable to contact three plaintiffs, whom they had represented both individually and as co-lead counsel throughout the litigation, and therefore had not obtained their consents. However, co-lead counsel suggested that they be permitted to accept the stipulation of settlement on behalf of these three individuals, since they knew of no reason why the three plaintiffs would deny them the authority to execute a definitive settlement agreement on their behalf.[4] Defense counsel agreed to this procedure with the result that on February 22, 1974, the approval of the stipulation of settlement had been obtained from all the original plaintiffs and intervenors.

However, two attempts were made to prevent the consummation of the settlement and the dismissal of the litigation. First, on February 22, 1974, Thomas G. Jenny, a member of the alleged class of purchasers of Ecological stock, filed a motion to intervene in the litigation with the district court, for the stated purpose of preventing the consummation of the stipulation of settlement. Simultaneous with the filing of the intervention motion with the district court, Jenny petitioned the Supreme Court for permission to intervene in the pending petition for a writ of certiorari, which was stipulated to be voluntarily dismissed by the named plaintiffs pursuant to the terms of the settlement. In support of allowing his intervention in both actions Jenny argued that the consummation of the proposed settlement, with the resultant dismissal of both the action in the district court and the petition for certiorari in the Supreme Court, would breach fiduciary duties owed by the named plaintiffs to other class members and, in addition, would constitute a sale of the appeal rights of class members under *Young v. Higbee*, 1945, 324 U.S. 204, 65 S.Ct. 594, 89 L.Ed. 890. On March 1, 1974, the district court denied Jenny's motion to intervene on the grounds that it was not timely made and that "the stipulation of settlement in no way affects his rights". This court subsequently denied Jenny's request for an interlocutory injunction to stay the consummation of the settlement below. On April 10, 1974, Jenny filed with the Supreme Court a petition seeking an injunction to stay the proceedings in the district court and to prevent the

3. These letters were mailed special delivery to the individual plaintiffs and intervenors, and copies were sent by air mail to individual counsel.

4. Appellees' brief filed with this court states that the consent of the three plaintiffs was obtained by co-lead counsel subsequent to the court order enforcing the terms of the stipulation of settlement.

parties from consummating the settlement. The Supreme Court, on April 15, 1974, denied both Jenny's application for an injunction and his motion to intervene in the petition for a writ of certiorari.

The second attempt to prevent the consummation of the settlement, and the basis of this appeal, relates to the attempted revocation by Skydell and Dutchen of their ratification of the stipulation of settlement. On February 26, 1974, and February 28, 1974, Skydell and Dutchen, respectively, sent telegrams to co-lead counsel and to Chief Judge Fulton of the Southern District of Florida, in the absence of Judge Fay who handled the case below throughout, which purported to revoke their acceptances of the settlement proposal "[i]n light of advice from my attorney . . . regarding abandonment of class and my possible duties as class representative . . ." Because of these telegrams Judge Fay held a hearing on March 14, 1974, to "clarify the status of the case", and to determine the objections of Skydell and Dutchen to the settlement agreement. At that hearing it was agreed that an enforcement hearing should be held to determine whether the stipulation of settlement was enforceable. The enforcement hearing was held on March 27, 1974. At that time Skydell and Dutchen, through counsel, argued that their ratification of the stipulation of settlement was void or voidable due to the following actions and omissions on the part of co-lead counsel: (i) that the letter from co-lead counsel purporting to state the material terms of the settlement omitted and misrepresented certain material terms; (ii) that Skydell and Dutchen were misled into believing that their individual counsel were aware of and had approved the terms of the stipulation; and (iii) that co-lead counsel failed to obtain the consent of all named plaintiffs, and did not have the authority to accept the stipulation on behalf of those plaintiffs whose consent had not been secured. Skydell and Dutchen in addition argued that the named plaintiffs would breach fiduciary duties owed to members of the originally alleged classes both by dismissing the action in the district court and the petition for certiorari in the Supreme Court, and that such actions amounted to a sale of class rights, citing and relying upon *Young v. Higbee*, supra.

After hearing oral argument and receiving briefs from the parties on these points, the district court rejected these arguments, and on March 28, 1974, entered an order enforcing the terms of the stipulation of settlement. In support of the March 28 order the district court made the following findings of fact:

"1. The material terms of the stipulation of settlement were properly, fairly, and adequately communicated by co-lead counsel for plaintiffs to all plaintiffs, including plaintiffs Dutchen and Skydell, by letter dated February 9, 1974."

"2. All plaintiffs except [the three whom co-lead counsel had been unable to reach] had knowledgeably accepted and ratified the terms of the stipulation of settlement by February 22, 1974."

3. That co-lead counsel "were authorized to accept the terms of the stipulation of settlement on behalf of" the three unavailable plaintiffs, whom co-lead counsel had represented "throughout the litigation."

"4. The stipulation of settlement was binding on all plaintiffs on February 22, 1974."

On April 4, 1974, the district court ordered the dismissal of the litigation with prejudice to the named plaintiffs and intervenors, except as provided in the Settlement Agreement. Subsequently, the pending petition for a writ of certiorari was voluntarily dismissed by the parties pursuant to Rule 60(1) of the Supreme Court Rules.

[1] Appellants, Skydell and Dutchen, seek to have us declare the settlement agreement unenforceable and/or void. In support of this request they first set

forth the same objections to the settlement agreement they presented at the March 27, 1974, enforcement hearing in the district court, *supra*. Initially we observe that the appellants make no argument that the settlement agreement is unfair to them or to any of the other original named plaintiffs or intervenors. See *Cia Venezolana De Navegacion v. Harris*, 5 Cir. 1967, 374 F.2d 33. Further, we are guided throughout our decision by the principle that "[s]ettlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits". *D. H. Overmyer Co. v. Loflin*, 5 Cir. 1971, 440 F.2d 1213, 1215; *W. J. Perryman & Co. v. Penn Mutual Fire Insurance Co.*, 5 Cir. 1968, 324 F.2d 791, 793.

[2–4] In considering the validity of the district court's findings of fact contained in the March 28, 1974 order, we are governed by the "clearly erroneous" standard. F.R.Civ.P. 52(a); *McAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. The test we apply to the findings below "is not simply whether the reviewing court would have found otherwise but whether the trial court could permissibly find as it did". *Movible Offshore, Inc. v. The M/V Wilken A. Falgout*, 5 Cir. 1973, 471 F.2d 268, 271; *Guardian Life Insurance Co. of America v. Eagle*, 5 Cir. 1973, 484 F.2d 382, 384. The record of the March 27 enforcement hearing, of the March 14 status conference, and the documents and affidavits submitted to the district court by the parties prior to and at those hearings contain ample evidence to support the lower court's findings. After carefully reviewing all of the evidence before the district court we are not convinced that "on the whole record that the finding[s] [of the district court do] not reflect the truth and right of the case". *Wright, Federal Courts* § 96, at 432 (1970); *Glapion v. MS Journalist*, 5 Cir. 1973, 487 F.2d 1252, 1254. This is not a case requiring reversal under the "clearly erroneous" standard.[5]

Appellants contend however that the trial court erred in enforcing the stipulation of settlement because the settlement was void as a matter of law as constituting a sale of class rights by the named plaintiffs. More particularly, the appellants claim that the voluntary dismissal of the petition for a writ of certiorari, as required by the terms of the settlement, was a breach of a fiduciary duty owed by the named plaintiffs and intervenors to nonparty class members. In support of the appellants, the Securities Commission filed an *amicus curiae* brief in which it argues that the district court erred by failing to require that notice under Rule 23(e), F.R.Civ.P., be given to members of the asserted class of the proposed settlement.[6] The arguments of the appellants and the S.E.C. ignore the difference between a class action and a non-class action. They place undeserved emphasis upon mere allegations of class action status by individual plaintiffs, rather than upon a judicial determination that a cause of action does not meet the requirements of subdivisions (a) and (b) of Rule 23 and, therefore, may not be maintained as a class action.

[5, 6] The special prophylactic function that subdivision (e) of Rule 23 was designed for is to "assure that any person whose rights would be affected by a

5. Additionally, since material facts concerning the existence of an agreement to settle were in dispute the district court followed procedure approved by this court by holding a plenary hearing to determine the enforceability of the settlement rather than summarily enforcing it. *Massachusetts Casualty Insurance Co. v. Forman*, 5 Cir. 1972, 469 F.2d 259, 260. Accord *Autera v. Robinson*, 1969, 136 U.S.App.D.C. 216, 419 F.2d 1197.

6. Subdivision (e) of Rule 23 provides:

"(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

dismissal or compromise has the opportunity to contest the proposed action". 7A Wright & Miller, Federal Practice & Procedure § 1797, at 234 (1972); Advisory Committee's Notes to Proposed Rules of Civil Procedure, Rule 23, 1966, 39 F.R.D. 69, 104. In order to protect the rights of absent class members during "the interim between filing and the 23(c)(1) determination by the court", other courts have required that for purposes of the notice provisions of subdivision (e) that the action be presumed proper for class action determination. *Philadelphia Electric Co. v. Anaconda American Brass*, E.D.Pa.1967, 42 F.R.D. 324, 326. See, e. g., *Katz v. Carte Blanche Corporation*, 3 Cir. 1974, 496 F.2d 747; *Kahan v. Rosentiel*, 3 Cir. 1970, 424 F.2d 161, cert. denied, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290; *Rothman v. Gould*, S.D. N.Y.1971, 52 F.R.D. 494; *Yaffee v. Detroit Steel Corporation*, N.D.Ill.1970, 50 F.R.D. 481. Appellants and the S.E.C. ask this court to extend the judicial gloss on subdivision (e) of Rule 23 to encompass the situation where as here the trial court has determined prior to the execution of a settlement agreement that the action may not be maintained as a class action under Rule 23. This we decline to do. As stated by the Advisory Committee's Notes to Rule 23, "a *negative determination* [of class action status] means that *the action should be stripped of its character as a class action*". Advisory Committee Notes, supra, 39 F.R.D. at 104 (emphasis added). Hence, where a court has ruled under Rule 23(c)(1) that an action cannot properly be maintained as a class action the notice requirements of Rule 23(e) do not apply, at least where the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court. *Beaver Associates v. Cannon*, S.D.N.Y.1973, 59 F.R.D. 508, 512; *Polakoff v. Delaware Steeplechase and Race Association*, D.Del.1966, 264 F.Supp. 915, 916; *Berger v. Purolator Products, Inc.*, S.D.N.Y.1966, 41 F.R.D. 542, 545.

[7] Similarly lacking in merit is appellants' contention that the named original plaintiffs and intervenors breached a fiduciary duty to absent members of an alleged class in consummating the settlement agreement in exchange for the voluntary dismissal of the petition for writ of certiorari. The rule which appellants ask this court to adopt would require that in every action in which class action certification is denied by a district court, the named plaintiffs would be precluded from executing a settlement of their individual claims, and would be required to litigate through appellate review of the interlocutory order denying class action certification after a final judgment in the trial court.[7] The district court order dismissing the litigation, pursuant to the terms of the stipulation, did not prejudice the rights of individuals who were not parties to the litigation at the time of the dismissal. See *Eisen v. Carlisle & Jacquelin*, 1974, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732; *Greenfield v. Villager Industries, Inc.*, 3 Cir. 1973, 483 F.2d 824, 832. Nothing prevents other purchasers of Ecological stock from filing suit against the defendants in this litigation to recover their individual losses. In fact, three suits have been commenced, subsequent to the dismissal of this suit, alleging claims almost identical in substance to those that formed the basis of this litigation.[8]

7. In the circumstances here present, we cannot discern how the holding which appellants seek will have any effect on the alleged fiduciary duty which—under appellants' theory—has already been breached. First, the appellants fail to show any damage to them from the voluntary dismissal of the petition for certiorari. No member of the class to whom the alleged fiduciary duty was owed has joined the appellants in prosecuting this appeal, nor has any member of the alleged class commenced an action against the appellants or any other of the named plaintiffs for the alleged breach. Secondly, a finding by this court that the settlement agreement is void will not cure the alleged breach of duty of which the appellants complain, since, obviously, this court does not possess the power to order the reinstatement in the Supreme Court of the petition for a writ of certiorari.

8. *Robert C. Troup v. Peter Adolph, et al.*, S.D. N.Y., 75 Civ. 380; *Eli Frankel v. Peter Adolph,*

[8] The appellants have not only failed to show any prejudice to nonparty members of the alleged class by the settlement and dismissal of this action, they have also been unable to show that any of those individuals were relying on the petition for a writ of certiorari to exonerate their rights.[9] We fail to understand how individuals could have relied on the possibility that some day a court might determine that the suit was proper for class action determination because a petition for a writ of certiorari seeking review of the jurisdiction of this court to review an interlocutory order denying class action certification might have been granted.[10] Further, since no Rule 23(c)(3) notice of the maintenance of this litigation was ever given or required to be given to nonparty members of the originally alleged class, reliance by those individuals on this action to recover their losses would be particularly misplaced. Appellants point out that the claims of nonparties may now be barred by the statute of limitations. But recent decisions by the Supreme Court indicate that, at least in certain situations, the commencement of a class action tolls the applicable statute of limitations as to all members of the class, until a determination of the propriety of maintaining the action as a class action is made by the trial court. *Eisen v. Carlisle & Jacquelin*, 1974, 417 U.S. 156, 177, n. 13, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732, 748; *American Pipe & Construction Co. v. Utah*, 1974, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713. We note further that the motion for class action certification was denied by the district court on March 13, 1973, and the stipulation of settlement was entered into on February 22, 1974; thus, any party who failed to seek intervention in the consolidated action between those two dates can blame no one but himself if his action is now barred:

> "If such a bar does exist, it is the result of their lethargy and indifference and not the breach of any duty, moral or otherwise, on the part of the plaintiffs or the Court to awaken them from their slumber."

Polakoff v. Delaware Steeplechase and Race Association, D.Del.1966, 264 F.Supp. 915, 916.

[9] Since on the record before us, we find that individuals who were not parties to the litigation were not directly affected by the dismissal of the petition for certiorari, the appellants' reliance on *Young v. Higbee Co.*, 1945, 324 U.S. 204, 65 S.Ct. 594, 89 L.Ed. 890, is misplaced. Essential to the Supreme Court's opinion in *Young* was the finding that the abandonment of the appeal in that case by named plaintiffs had a direct adverse effect on the "inseparable" interests of others not parties to the litigation, who were bound by the judgment of the lower court with no further opportunity to appeal. *Young*, supra, at 210–14, 65 S.Ct. at 598–99, 89 L.Ed. at 896–98. The holding in *Young* is inapposite here where the dismissal of the action as previously noted has no res judicata effect on the rights of individuals not parties to the litigation.[11]

et al., E.D.N.Y., 75 Civ. 159; *Thomas G. Jenny v. Haskins & Sells, et al.*, S.D.N.Y., 75 Civ. 1423. The latter two complaints contain class action allegations.

9. It appears that the stockholders of Ecological were apprised of the district court order denying the motion for class action certification in a proxy statement mailed to them in September, 1973, which stated:

> "The effect of the determination of the district court is that only those plaintiffs who are suing in their own names or those permitted to intervene in the action will be entitled to recover damages . . ."

10. It appears that at the time during which the petition for a writ of certiorari which is the focus of this appeal was pending another petition was pending in the Supreme Court raising the same issue, and certiorari was subsequently denied on the latter petition. See *Lupia v. Stella d'Oro Biscuit Co.*, 42 U.S.L.W. 3156, cert. denied 1974, 417 U.S. 930, 94 S.Ct. 2639, 41 L.Ed.2d 232.

11. We think that our holding that no fiduciary duty was breached by the voluntary dismissal of the petition for certiorari is inferentially supported by the Supreme Court's denial of Jenny's motion to intervene in the petition for

[10] The appellants' final contention is that the stipulation of settlement is invalid because it dismissed a derivative action, Count 8 of the consolidated complaint, without notice to the shareholders of Ecological as required by Rule 23.1, F.R.Civ.P.[12] In response the appellees argue that the derivative count was rendered judicially moot in other litigation, *S.E.C. v. Harold P. Koenig, et al.*, S.D.N.Y.1973, 71 Civ. 5016, and because the shareholders of Ecological voted on February 15, 1973, to release the corporation's former president, the primary defendant in the derivative count, from and against all corporate claims then known. We do not reach the question of whether the derivative count was mooted, since we find that the appellants did not raise the dismissal of the derivative claim as a grounds for invalidating the settlement agreement in the district court. Further, an action has been commenced in the Southern District of New York which contains a derivative claim identical to the one alleged in the consolidated complaint in this action, and this new action will protect the rights, if any, of the corporation. *Thomas G. Jenny v. Haskins & Sells, et al.*, S.D.N.Y., 75 Civ. 1423.

Inasmuch as we affirm the order of the district court enforcing the settlement and dismissing the action, we find it unnecessary to determine whether the district court erred in denying class action certification.

Affirmed.

BEST COPY AVAILABLE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CARL M. PEARSON, et al.,

Plaintiffs,

-against-

ECOLOGICAL SCIENCE CORPORATION, et al.,

Defendants.

CASE NO. 71-Civ-1058-PF

FILED

MAR 28 1974

JOSEPH I. BOGART
CLERK, U. S. DIST. CT.
SOUTHERN DIST. OF FLA.
MIAMI FLA.

ORDER

This cause came on for plenary hearing on March 27, 1974, at 8:30 a.m., pursuant to this Court's Order of March 15, 1974, that any party in this action desiring so to do show cause why the terms of the Stipulation of Settlement approved and adopted as the Order of this Court by Order dated January 31, 1974, should not be enforced.

The Order of March 15, 1974 was entered following a conference held by the Court to clarify the status of the cause on March 14, 1974. In addition to co-lead counsel for plaintiffs and counsel for various defendants, Dermot G. Foley, appearing on behalf of plaintiff Arnold Dutchen, attended that conference and presented argument to the Court.

At the plenary hearing only plaintiffs A. Harry Skydell and Arnold Dutchen attempted to show cause why the Stipulation of Settlement should not be enforced.

Plaintiff Skydell submitted his affidavit "in opposition to the enforcement of" the Stipulation of Settlement.

Plaintiff Dutchen submitted the affidavit of his counsel, Mr. Foley, "to urge the Court to deny enforcement of" the Stipulation of Settlement, and also submitted his own affidavit.

Mr. Foley appeared at the hearing and orally argued that the Stipulation of Settlement should not be enforced.

The Court also received and considered the affidavit of Thomas H. Seymour, a member of the law firm of Kelly, Black, Black & Kenny, P.A., co-lead counsel for plaintiffs, and the affidavit of Aubrey V. Kendall, a member of the law firm of Mershon, Sawyer, Johnston, Dunwody & Cole, counsel for plaintiff-intervenors Essex Fund, Inc. and Salem Fund, Inc., both of whom offered themselves for examination on the subject matter of their affidavits.

The Court also admitted in evidence without objection and considered the following four copies of letters:

(1) From co-lead counsel to plaintiff Skydell, dated February 9, 1974, countersigned by plaintiff Skydell, dated February 11, 1974, accepting the proposed settlement.

(2) From co-lead counsel to plaintiff Dutchen, dated February 9, 1974, countersigned by plaintiff Dutchen, dated February 11, 1974, accepting the proposed settlement.

(3) From Stuart D. Wechsler, counsel for plaintiff Skydell, dated February 26, 1974, to co-lead counsel, quoting a telegram of that date from plaintiff Skydell to co-lead counsel purporting to revoke his acceptance.

(4) From Mr. Foley, dated February 28, 1974, to co-lead counsel, quoting a telegram of that date from plaintiff Dutchen to co-lead counsel purporting to revoke his acceptance.

The Court further received and considered Defendants' Memorandum in Support of Enforcement of Settlement, and heard argument of defendants' counsel.

The Court makes the following findings:

1. The material terms of the Stipulation of Settlement were properly, fairly, and adequately communicated by co-lead counsel for plaintiffs to all plaintiffs, including plaintiffs Dutchen and Skydell, by letter dated February 9, 1974.

2. All plaintiffs except plaintiffs Frederick C. Marcks and Leonard and Ester Schwade had knowledgeably accepted and ratified the terms of the Stipulation of Settlement by February 22, 1974. Plaintiffs A. Harry Skydell and Arnold Dutchen accepted and ratified the terms of the Stipulation of Settlement on February 11, 1974 by countersigning the February 9, 1974 letters from co-lead counsel.

3. On February 22, 1974, co-lead counsel for plaintiffs accepted the terms of the Stipulation of Settlement on behalf of plaintiffs Frederick C. Marcks and Leonard and Ester Schwade, whom they had been unable to contact despite diligent effort. Under the circumstances, co-lead counsel, who had represented plaintiffs Marcks and the Schwades throughout the litigation, were authorized to accept the terms of the Stipulation of Settlement on behalf of those plaintiffs.

4. The Stipulation of Settlement was binding on all

plaintiffs on February 22, 1974.

5. No party to this cause has shown any reason, in fact or in law, why the Stipulation of Settlement and this Court's Order of January 31, 1974, should not be enforced.

IT IS THEREFORE ORDERED that:

(1) the Stipulation of Settlement dated January 31, 1974 is binding upon all parties to these consolidated actions and enforceable by and against them; and

(2) all parties and their counsel are directed to take all steps necessary and appropriate to close the settlement as contemplated by the Stipulation of Settlement.

DONE AND ORDERED at Miami, Florida, this 28th day of March, 1974.

Peter T. Fay

UNITED STATES DISTRICT JUDGE

MICROFILMED ON ROLL NO.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA - MIAMI DIVISION

NO. 71-1058-Civ-PF

CARL M. PEARSON, et al.,

Plaintiff,

-v-

ECOLOGICAL SCIENCE CORPORATION, et al.,

Defendants.

FILED
APR 4 1974
JOSEPH I. BOGART
CLERK, U. S. DIST. CT.
SOUTHERN DIST. OF FLA

ORDER OF DISMISSAL

The Court by order filed January 31, 1974, having approved and adopted the Stipulation of Settlement dated January 31, 1974, and by order filed March 28, 1974 having, among other things, directed all parties and their counsel to take all steps necessary and appropriate to close the settlement as contemplated by the Stipulation of Settlement, and it appearing to the Court that a Settlement Agreement dated April 4, 1974 and a Stipulation of Dismissal have been executed by all parties to this cause, it is therefore

ORDERED that these actions be dismissed, without costs to any party and with prejudice except as provided in the Settlement Agreement, and it is further

ORDERED that, following the withdrawal of documents as provided in the Stipulation of Settlement and Settlement Agreement, the Clerk is hereby directed to seal the Court file.

DONE AND ORDERED at Miami, Florida this 4th day of April, 1974.

UNITED STATES DISTRICT JUDGE

APPENDIX D

RELEVANT PORTIONS OF THE SECURITIES EXCHANGE ACT OF 1934

SEC. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. (15 U.S.C. 78jb)

SEC. 13. (a) Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission

may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security--

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 12, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange. (15 U.S.C. 78m(a))

SEC. 14. (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title.
(15 U.S.C. n(a))

SEC. 20. (a) Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable unless the controlling person acted in good faith and

did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder through or by means of any other person.

(c) It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under this title or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information.

(15 U.S.C. t)

SEC. 27. The district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory

or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgment and decrees so rendered shall be subject to review

as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts. (15 U.S.C. 78aa)

RELEVANT SEC RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

Rule 10b-5. Employment of Manipulative and Deceptive Devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security. (17 CFR 240-10b-5)

Rule 13a-1. Requirement of Annual Reports.

Every issuer having securities registered pursuant to Section 12 of the Act shall file an annual report on the appropriate form authorized or prescribed therefor for each fiscal year after the last full fiscal year for which financial statements were filed in its registration statement. Registrants on Form 8-B shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. Annual reports shall be filed within the period specified in the appropriate report form. At the time of filing the annual report, a registrant other than a person registered under the Public Utility Holding Company Act of 1935 or the Investment Company Act of 1940 shall pay to the Commission a fee of $250, no part of which shall be refunded. (17 CFR 240.13a-1)

Rule 13a-11. Current Reports on Form 8-K.

(a) Except as provided in paragraph (b), every registrant subject to Rule 13a-1 shall file a current report on Form 8-K within ten days after the close of any month during which any of the events specified in that form occurs, unless substantially the same information as that required by Form 8-K has been previously reported by the registrant.

(b) This rule shall not apply to foreign governments, foreign private issuers required to make reports on Form 6-K pursuant to Rule 13a-16, issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file quarterly reports pursuant to Rule 13a-12. (17 CFR 240.13a-11)

Rule 13a-13. Quarterly Reports on Form 10-Q.

(a) Except as provided in paragraph (b), every issuer which has securities registered pursuant to Section 12 of the Act and which is required to file annual reports pursuant to Section 13 of the Act on Form 10-K, 12-K or U5S shall file a quarterly report on Form 10-Q, within the period specified in General Instruction A to that form, for each of the first three fiscal quarters of each fiscal year of the issuer, commencing with the first such fiscal quarter which ends after securities of the issuer become so registered.

(b) Quarterly reports on Form 10-Q need not be filed by the following issuers:

(1) Investment companies required to file quarterly reports pursuant to Rule 13a-12;

(2) Real estate companies required to file quarterly reports pursuant to Rule 13a-15;

(3) Foreign private issuers required to file reports pursuant to Rule 13a-16;

(4) Life insurance companies and holding companies having only life insurance subsidiaries; or

(5) Companies in the promotional or development stage to which paragraph (c) of Rule 5A-01 of Article 5A of Regulation S-X is applicable.

(c) Public utilities, common carriers and pipe line carriers which submit financial reports to the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission or the Interstate Commerce Commission may, at their option, in lieu of furnishing the information called for by Form 10-Q, file as exhibits to reports on this form copies of their reports submitted to such Board or Commission for the preceding fiscal quarter or for each month of such quarter, as the case may be, together with copies of their quarterly reports, if any, for such periods sent to their stockholders.

(d) Notwithstanding the foregoing provisions of this rule, reports on Form 10-Q, or reports submitted in lieu thereof pursuant to paragraph (c), shall not be deemed to be "filed" for the purpose of Section 18 of the Act or otherwise subject to the liabilities of that section, but shall be subject to all other provisions of the Act. (17 CFR 240.13a-13)

Reg. §240.14a-9. (a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or

necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made. (17 CFR 240.14a-9)

RELEVANT PORTIONS OF THE SECURITIES ACT OF 1933

SEC. 15. Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist. (15 U.S.C. 77o)

SEC. 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. (15 U.S.C. 77q(a))

SEC. 22. (a) The district courts of the United States, the United States courts of any Territory, and the District Court of the United States for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgatd by the Commission in respect thereto, and, concurrent with

State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.
(15 U.S.C. 77 V(a))

CAPITAL PRESS, INC. — MIAMI, FLORIDA

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

in the

Supreme Court

of the

United States

OCTOBER TERM, 1975

No. 75-1076

HARRY A. SKYDELL AND ARNOLD DUTCHEN,
Petitioners,

vs.

ECOLOGICAL SCIENCE CORPORATION, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	4
Argument	
Point I	
The writ of *certiorari* should be denied because petitioners are seeking to have this Court review the evidence concerning the settlement of this action and inferences drawn from such evidence	10
Point II	
The district court specifically stripped the individual plaintiffs of their status as class representatives and adjudicated that the individual plaintiffs represented only themselves and therefore Rule 23 of the Federal Rules of Civil Procedure is not applicable	11

INDEX (cont.)

Page

Point III

Petitioners' individual attorneys of their choice approved the terms of settlement and all material terms of the stipulation of settlement were communicated to petitioners by their individual attorneys 14

Conclusion 17

Certificate of Service 18

TABLE OF AUTHORITIES

Cases: **Page**

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) 6

Eisen v. Carlisle & Jacquelin,
417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) 7

General Talking Pictures Corp. v. Western Electric Co., Inc.,
304 U.S. 175, 82 L.Ed. 1273, 58 S.Ct. 849 (1938) 10

Lupia v. Stella D'Oro Biscuit Co., Inc.,
417 U.S. 930, 94 S.Ct. 2639, 41 L.Ed.2d 232 (1974) 7, 11

Young v. Higbee Co.,
324 U.S. 204, 65 S.Ct. 594, 89 L.Ed. 890 (1945) 13

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Respondents, Carl M. Pearson, et al., the plaintiffs-appellees below* (hereinafter "plaintiffs-respondents"),

*Respondents, Ecological Science Corporation, et al., the defendants-appellees below (hereinafter "defendants-respondents"), are submitting a separate brief in opposition to the petition.

respectfully submit this brief in opposition to the petition of Harry A. Skydell and Arnold Dutchen that a writ of *certiorari* issue to review the judgment entered on October 31, 1975, by the United States Court of Appeals for the Fifth Circuit and pray that the petition be denied by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 522 F.2d 171 (5th Cir. 1975). Both this opinion and the findings of the United States District Court for the Southern District of Florida — Miami Division are printed as appendices to the petition for a writ of *certiorari*.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1975. The petition for a writ of *certiorari* was filed on or about January 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The "Questions Presented" as stated by the petitioners do not fairly arise from the record below. In a separate brief, the defendants-respondents will respond to the "questions" the petitioners contend are presented by the record in this action. This brief by plaintiffs-respondents

will respond only to the petitioners' contentions attacking the integrity of the settlement and the events and negotiations preceding the settlement.

I

Whether the writ of *certiorari* should be denied because petitioners are seeking to have this Court review the evidence concerning the settlement of this action and inferences drawn from such evidence.

II

Whether the district court specifically stripped the individual plaintiffs of their status as class representatives and adjudicated that the individual plaintiffs represented only themselves and therefore Rule 23 of the Federal Rules of Civil Procedure is not applicable.

III

Whether petitioners' individual attorneys of their choice approved the terms of settlement and all material terms of the stipulation of settlement were communicated to petitioners by their individual attorneys.

STATEMENT OF THE CASE

This action is the result of the consolidation of sixteen lawsuits which were filed by various individuals, most of which, until March 13, 1973, had been on behalf of a class comprised of all persons who had purchased shares of the defendant Ecological Science Corporation ("Ecological") during the period of approximately November 27, 1967 to approximately May 26, 1971.

Prior to the district court in Miami ordering the consolidation of these sixteen actions on March 20, 1972, the petitioners and their respective New York City attorneys employed and retained the firm of Koeppel, Stark, Marks & Newmark (the "Koeppel" firm) of Miami, Florida to represent petitioners in the proceedings below. On February 4, 1972, the Koeppel firm filed a notice of appearance in Case No. 71-1928-Civ-PF as counsel of record for Skydell and in Case No. 71-1926-Civ-PF as counsel of record for Dutchen. (A. 344; 345)*. On February 17, 1972, the district court sent to all counsel of record a copy of a proposed order pertaining to the court's intention to consolidate all pending actions and to appoint the firms of Kelly, Black, Black & Kenny, P.A. (the "Kelly" firm) and Kaufman, Taylor, Kimmel & Miller as co-lead counsel for the various plaintiffs in the consolidated actions and members of the class (A. 6)

Upon receipt of a copy of the proposed order, petitioners through their New York counsel and the Koeppel

*References to the pages of the appendix on appeal in the Court of Appeals will be disignated by the prefix "A". The appendix has been filed with the Clerk for the convenience of this Court.

firm, filed with the district court various affidavits and motion papers claiming that petitioners' interests would not be adequately protected unless their Miami attorneys, the Koeppel firm, were made one of co-lead counsel. (A. 34-47)

On March 20, 1972, the district court honored these pleas of the New York counsel and entered an order consolidating all pending actions and appointing petitioners' Miami attorneys, the Koeppel firm, and the Kelly firm as co-lead counsel for all plaintiffs in the consolidated action. (A. 48-52) Thereafter these two firms cooperated in the prosecution of the consolidated action.

The order of March 20, 1972 provided in part that all pre-trial matters would be "initiated and conducted by co-lead counsel, but other counsel representing particular plaintiffs may participate in such proceedings in subordination to co-lead counsel. . . . " and that co-lead counsel should consult with "additional counsel representing specific plaintiffs under limited circumstances." By the designation of co-lead counsel, it was the obvious intention of the district court to give the Koeppel and Kelly firms control of the prosecution of the action subject to "consultation by them with additional counsel representing specific plaintiffs." (A. 51)

On March 13, 1973, after in-depth briefing and lengthy and heated oral argument, the district court ruled that the consolidated action would not be permitted to be maintained as a class action. (A. 83) Co-lead counsel for plaintiffs were of the opinion that the district court had erred. Co-lead counsel for plaintiffs then filed an interloc-

utory appeal from the district court's order. The court of appeals, however, on May 29, 1973, granted the defendants' motion to dismiss the appeal on jurisdictional grounds. (A. 106) On July 9, 1973, the court of appeals denied plaintiffs' motion for rehearing and for rehearing *en banc*. (A. 107) On October 4, 1973, co-lead counsel for plaintiffs filed a petition for a writ of *certiorari* with this Court which presented the question: "Whether or not an order granting or denying class action certification is a collateral order automatically and immediately appealable prior to final judgment on the underlying merits of the case under the holding in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).*

Meanwhile, the district court during the course of the interlocutory appeal, proceeded apace as if the petition had never been filed. On November 16, 1973, the district court entered an order which set the date for trial of the consolidated action for March 18, 1974. (A. 108) Intensive pretrial discovery was conducted during the course of the interlocutory appeal. The discovery included the propounding and answering of numerous interrogatories, and inspection of voluminous documents; and the taking of depositions of plaintiffs and defendants throughout the United States. The district court advised all counsel of record at various hearings before the court that the action

*See Carl M. Pearson, et al., Petitioners, v. Ecological Science Corp., et al., Respondents, Docket No. 73-596, voluntarily dismissed by the parties pursuant to Rule 60(1) of the Supreme Court Rules after settlement of the action.

would not be continued for any reason (and in particular due to the pending petition before this Court) and that the trial date of the action would commence on the scheduled trial date. In view of the trial date and these pronouncements of the district court, it was apparent that the plaintiffs' petition would not be ruled on prior to the trial of the consolidated action. This conclusion was inescapable since this Court had directed counsel in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), to file briefs concerning a petition for a writ of *certiorari* and at the same time this Court was not ruling on a petition filed in *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 417 U.S. 930, 94 S.Ct. 2639, 41 L.Ed.2d 232 (1974), which raised precisely the same question as the one raised in the plaintiffs' petition in the instant action. It was clear that this Court would not rule on either the *Lupia* petition or the petition in the instant action until *Eisen* was decided.*

As is the case in most lawsuits, serious settlement negotiations commenced at the point in time where both co-lead counsel and defense counsel were getting ready to devote all of their available time to trial preparation. After approximately two months of negotiations (taking place, in the main, during recesses in the intensive discovery being conducted by plaintiffs), the defendants made a substantial settlement offer.

On January 31, 1974, co-lead counsel for plaintiffs and defense counsel entered into a stipulation of settlement

*Oral argument in *Eisen* was set for February 25, 1974. The case was not decided by this Court until May 28, 1974. The *Lupia* petition was denied on June 3, 1974.

subject to the ratification of all plaintiffs. (A. 174-181) Co-lead counsel then submitted the settlement for ratification to the only people anyone at the time would acknowledge to be co-lead counsel's clients, that is, the named plaintiffs.

Co-lead counsel on February 9, 1974, wrote to petitioners and all other named plaintiffs for their authorization to execute a definitive agreement which would incorporate the terms of the stipulation of settlement. (A. 347; 350) Copies of the letter addressed to the respective plaintiffs were forwarded to all counsel known by co-lead counsel to be interested in the litigation and proposed settlement.* With the exception of three original and intervening plaintiffs,** whom co-lead counsel agreed to treat identically with all other plaintiffs, all plaintiffs and intervenors, including Skydell and Dutchen, ratified the terms of settlement and authorized co-lead counsel in writing to proceed with the settlement and execute the definitive agreement. (A. 217; 218; 349; 352)

On February 11, 1974, petitioners countersigned their respective copies of the letters sent to them by co-lead counsel signifying their ratification of the settlement. (A. 349; 352)

---

*In view of the extremely favorable terms of the proposed settlement co-lead counsel did not anticipate any objections from the individual plaintiffs or any individual counsel, who, like co-lead counsel, were interested in the recovery obtained for their clients. For this reason, the letters to the plaintiffs were sent air-mail, special delivery and the copies to any interested counsel were sent air-mail. (A. 216-217)

**Co-lead counsel subsequently received from these plaintiffs written ratification of the terms of settlement and authorization to execute the definitive agreement.

On February 22, 1974, Thomas G. Jenny moved to intervene in the district court seeking to prevent the settlement of the action and also moved to intervene in this Court asking to prosecute the petition for writ of *certiorari*. Co-lead counsel advised both the district court and this Court that they would proceed with the settlement including the dismissal of the petition, unless Jenny's motions were granted. The motions were denied. (A. 154-156; 160)

On February 26, 1974, and February 28, 1974, respectively, petitioners' New York counsel sent telegrams to co-lead counsel which were, except for the names of the attorneys, identical in language. Both telegrams stated in pertinent part: "In light of advice from my attorney . . . . regarding abandonment of class and my possible duties as class representative, I revoke my acceptance of settlement proposal pending further clarification by the Courts." (A. 153; 300)

Thereafter, the district court held a hearing on March 14, 1974, to "clarify the status of the case." (A. 157; 230) On March 15, 1974, the district court set a date of March 27, 1974, to receive evidence and hear argument with regard to whether the terms of the stipulation of settlement should be enforced. (A. 159)

An evidentiary hearing was held on March 27, 1974, with Dutchen's New York counsel, Mr. Foley, attending on behalf of petitioners. (A. 260-297) On March 28, 1974, the district court entered an order enforcing the terms of the stipulation of settlement and directing the parties and their counsel to close the settlement. (A. 166-169)

On April 4, 1974, pursuant to the district court's order of March 28, 1974, a definitive settlement agreement was executed by co-lead counsel for plaintiffs and defense counsel. Since the consolidated action was settled, an order was entered by the district court on April 4, 1974 dismissing the consolidated action with prejudice except as provided in the settlement agreement, and the petition pending before this Court was dismissed. (A. 170)

On October 31, 1975, the court of appeals affirmed the actions and orders of the district court.

ARGUMENT

Point I

The writ of *certiorari* should be denied because petitioners are seeking to have this Court review the evidence concerning the settlement of this action and inferences drawn from such evidence.

Petitioners seek to have this Court review, for a third time, the facts and circumstances surrounding the settlement of this action. This is not grounds for the granting of a writ of *certiorari* under Rule 19 of this Court.

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U.S. 175, 178, 82 L.Ed. 1273, 1275, 58 S.Ct. 849 (1938)

Point II

The district court specifically stripped the individual plaintiffs of their status as class representatives and adjudicated that the individual plaintiffs represented only themselves and therefore Rule 23 of the Federal Rules of Civil Procedure is not applicable.

The named plaintiffs have been adjudicated just individual plaintiffs with no representative status whatsoever by the district court's order of March 13, 1973, denying their right to maintain this suit as a class action. The district court by that order specifically stripped the individual plaintiffs of their status as class representatives. Plaintiffs exhausted all remedies to retain their status but encountered a stone wall wherever they turned. The court of appeals shut the door on them. It appeared unlikely that this Court would entertain the petition for *certiorari* in the case of *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 417 U.S. 930, 94 S.Ct. 2639, 41 L.Ed.2d 232 (1974), which presented exactly the same issue.

Whether or not co-lead counsel and the named plaintiffs, after all of the aforementioned frustrations of their attempts to represent the class, retained some residual fiduciary duty to the faceless members of the class to proceed to trial and appeal in any circumstances is the core question. We anticipated that we would have to face the question unless we could obtain interlocutory review of the determination against the class action. As we put it in our petition for writ of *certiorari* to this Court:

> "What interest will any named plaintiff have in appealing a decision denying the class action certification once he himself has either been paid off or has won? Acts of heroic altruism are unknown in the investor community and no public representative is a party to the suit."

We described our plight to this Court when Mr. Jenny moved to intervene on the basis that we and our clients had a fiduciary duty to the faceless members of the class to refuse any settlement and proceed to trial:

> "What are attorneys representing clients in such status to do when an acceptable offer comes? If the attorneys recommend against settlement and a result less favorable than the offer ensues, the attorneys most certainly will face an action for malpractice. On the other hand, if the attorneys recommend acceptance, other attorneys, perhaps with visions of sugar plum fees dancing in their eyes, will appear and point the finger of sell-out."

We determined on the basis of common sense and the prior orders of the district court and court of appeals, that neither we nor our clients *at that point* possessed any fiduciary duty to refuse the settlement and proceed to trial. A legal rule that any such fiduciary obligation existed, in our opinion, would require of mere men (investors at that) the altruism of angels and would torture the sacred policy of the law in favor of compromise and settlement.

The court of appeals in its decision agreed, and we respectfully submit correctly found:

> "The district court order dismissing the litigation, pursuant to the terms of the stipulation, did not prejudice the rights of individuals who were not parties to the litigation at the time of the dismissal . . . . Nothing prevents other purchasers of Ecological stock from filing suit against the defendants in this litigation to recover their individual losses." 522 F.2d at 177.

Similarly, petitioners' reliance on this Court's decision in *Young v. Higbee Co.*, 324 U.S. 204, 65 S.Ct. 594, 89 L.Ed. 890 (1945) was found to be misplaced by the court of appeals.

> "Essential to the Supreme Court's opinion in *Young* was the finding that the abandonment of the appeal in that case by named plaintiffs had a direct adverse effect on the 'inseparable' interests of others not parties to the litigation, who were bound by the judgment of the lower court with no further opportunity to appeal. *Young, supra,* at 210-14, 65 S.Ct. at 598-99, 89 L.Ed. at 896-98. The holding in *Young* is inapposite here where the dismissal of the action as previously noted has no res judicata effect on the rights of individuals not parties to the litigation." 522 F.2d at 178.

Petitioners' contention that the rights of appeal of the unnamed members of the class have been prejudiced by the settlement and dismissal of this action is simply not accurate. Only the named plaintiffs' rights have been affected by the settlement and dismissal of the action. Any interested member of the class the named plaintiffs sought

to represent can still prosecute an individual action or an action as representative of the class and can appeal any adverse class action order in his own suit.

Point III

Petitioners' individual attorneys of their choice approved the terms of settlement and all material terms of the stipulation of settlement were communicated to petitioners by their individual attorneys.

Petitioners assert that "co-lead counsel obtained the consents of the petitioners to the stipulation through blatant misrepresentations by falsely implying that their attorneys had knowledge of and approved the settlement." Petitioners neglect to point out that their *individual* attorneys are one of the firms that is serving as co-lead counsel for the plaintiffs below.

On or about February 4, 1972, petitioners retained the Koeppel firm as attorneys of their choice to represent them individually. Notices of appearance were filed in the district court by the Koeppel firm in petitioners' individual cases. (A. 344; 345) Petitioners' New York counsel apparently approved and/or recommended the selection of the Koeppel firm; for prior to the consolidation by the district court of petitioners' individual actions with other pending actions, petitioners and their New York counsel inundated the district court with motions, affidavits and other papers to have the Koeppel firm appointed co-lead counsel in the consolidated action. (A. 34-47) It is clear

that the purpose of this maneuver was to have attorneys of petitioners' choice be continuously familiar with the status of the case and be in a position to protect the interests of petitioners. The appointment of the Koeppel firm as co-lead counsel at the same time dispensed with the necessity of petitioners' New York counsel participating in the prosecution of the action. The district court thereupon appointed petitioners' individual attorneys, the Koeppel firm, and the Kelly firm as co-lead counsel in the consolidated action. (A. 50)

Thereafter, on January 31, 1974, a stipulation of settlement was entered into by co-lead counsel for all plaintiffs subject to the various plaintiffs ratifying the terms of settlement and the various plaintiffs authorizing co-lead counsel to execute a definitive settlement agreement. (A. 174)

On February 9, 1974, petitioners' *individual* attorneys, the Koeppel firm, and the Kelly firm sent a letter to petitioners which included the material terms of the settlement affecting them. (A. 347; 350) On February 11, 1974, petitioners countersigned their acceptance and approval of the terms of settlement. (A. 349; 352) No consultation with petitioners' New York counsel was necessary since petitioners' Miami attorneys, the Koeppel firm, had approved the terms of settlement. A copy of the February 9th letter was forwarded to petitioners' New York counsel as a courtesy. (A. 216-217; 349; 352)

It is clear from a comparison of the February 9th letters with the terms of the stipulation of settlement that

only the parts of the stipulation of settlement which affected the individual plaintiffs were sent to the individual plaintiffs.

Furthermore, as shown above, the Koeppel firm represented petitioners individually. They had full knowledge of the terms of settlement. Accordingly, co-lead counsel communicated to petitioners all material terms of the stipulation of settlement. Petitioners' written ratification of the settlement, negotiated and approved by their own attorneys, on February 11, 1974, clearly bound them to the agreement.

CONCLUSION

For the reasons set forth above, and the reasons set forth in the brief of defendants-respondents, plaintiffs-respondents pray that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that three true and correct copies of the foregoing Brief of Plaintiffs-Respondents in Opposition to Petition for Writ of *Certiorari* was mailed this 12th day of March, 1976, to:

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By /s/ THOMAS H. SEYMOUR

Thomas H. Seymour

Supreme Court, U. S.
FILED
MAR 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1076

HARRY A. SKYDELL and ARNOLD DUTCHEN,
Petitioners,

against

ECOLOGICAL SCIENCE CORPORATION, *et al.*,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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HARRY A. SKYDELL and ARNOLD DUTCHEN,
Petitioners,

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Defendants-respondents (other than Harold P. Koenig and George V. R. Mulligan) submit this brief in opposition to the petition filed by two of ninety-nine original and intervening plaintiffs for a writ of certiorari to review an order of the Court of Appeals for the Fifth Circuit filed October 31, 1975, affirming unanimously two orders of the District Court for the Southern District of Florida, which enforced a stipulation of settlement in sixteen consolidated actions and dismissed the actions.[1]

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[1] Respondents' time to file this brief was extended from March 3 to March 17, 1976, on application based on advice that the Solicitor General had been requested by the Securities and Exchange Commission to authorize the filing of a brief *amicus curiae* in support of the Petition. Respondents have subsequently been advised by Deputy Solicitor General Friedman that the Solicitor General has determined not to authorize the filing of an *amicus* brief.

Questions Presented

1. Whether the Court of Appeals erred in holding that the District Court was not "clearly erroneous" in finding that petitioners had "knowledgeably accepted and ratified" the terms of the settlement and that the stipulation of settlement was binding upon all parties (see 6a, 12a-13a[2]).

2. Whether, in an action determined by the District Court not to be maintainable as a class action under Fed. R. Civ. P. 23 and in which no notice of pendency had been given to the putative class, a settlement of the individual claims of the original and intervening plaintiffs, which does not directly affect adversely the rights of non-parties, is a breach of fiduciary duty to members of the disallowed "class" and is for that reason void (see 7a-8a).

3. Whether the Court of Appeals erred in declining to review the District Court's dismissal, without notice or approval pursuant to Fed. R. Civ. P. 23.1, of a moot derivative claim, where petitioners had not urged the necessity of notice or approval in the District Court and where the identical claim has been reasserted in a new action (see 9a).

4. Whether the Court of Appeals, having affirmed the District Court's orders that the settlement was binding and the actions properly dismissed, erred in declining to review the District Court's earlier interlocutory order that the actions could not be maintained as class actions pursuant to Fed. R. Civ. P. 23 (see 9a).

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[2] The unanimous opinion of the Court of Appeals is reproduced at pages 1a-9a of the appendices bound with the Petition, and the District Court orders at pages 10a-14a; those appendices are cited herein as "a" with appropriate page references.

Statement of the Case

The record of the proceedings in the District Court is recounted faithfully and in detail in the Court of Appeals' unanimous opinion (see 2a-5a). Petitioners have misstated and omitted significant facts in portraying that record in their Statement of the Case (Petition at 6-9).

Confronted with the undeniable fact that "the stipulation of settlement dealt only with the claims of the ninety-nine named plaintiffs and did not purport to affect in any way the claims of other Ecological stockholders not involved in the litigation" (4a), petitioners strive (to the point of italicizing) to find such effect in a provision of the settlement stipulation authorizing the withdrawal of documents from the Court file and the sealing of the file (Petition at 7). What petitioners fail to add is that all withdrawn documents were returned to the District Court file prior to the hearing of the appeal in the Court of Appeals and that an order has been entered by the District Court, on the joint application of all parties, unsealing the file.[3] Hence, even this indirect effect of the settlement on absentees, if it can be considered a cognizable effect at all, has been removed.

Not only are members of the judicially disallowed class of Ecological stockholders free to pursue their individual claims notwithstanding the settlement of this litigation (and free to avail themselves of the record in that litigation); four such stockholders have already commenced actions asserting claims similar to those settled by peti-

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[3] Defendants-respondents had undertaken in their brief to the Court of Appeals to make such application. Pertinent excerpts from that brief and the District Court's unsealing order are annexed as an Appendix.

tioners.[4] Two of the complaints purport to assert claims on behalf of a class, in one case similar and in the other identical to that initially pleaded in this litigation. One of the complaints reasserts *in haec verba* the derivative claim which petitioners contend to have been improperly dismissed. The commencement and continued prosecution of these four actions is sufficient answer to petitioners' contention that the rights of absentees have been prejudiced by the settlement of individual claims in this litigation.

Finally, petitioners fail to mention that the principal contention they now press on this Court—that the settlement was void because it entailed a "sale" of fiduciary obligations (Petition at 7, 9-12)—was previously asserted by Thomas G. Jenny (one of the four new plaintiffs) when he sought to intervene in the District Court and in this Court to thwart the settlement. That contention was found wanting in merit when advanced by Jenny.[5] It has no more

[4] Three of the cases are noted in the Court of Appeals opinion (7a at n. 8); a fourth, *Newton N. Berger* v. *Peter Adolph*, was commenced in the Eastern District of Pennsylvania (No. 75-2354) following the Court of Appeals decision. All four cases have been transferred to the Southern District of Florida pursuant to 28 U.S.C. § 1404(a).

[5] On April 10, 1974, Jenny applied to this Court for a "stay and injunction" to preclude consummation of the settlement, one term of which called for the stipulated withdrawal of a petition for writ of certiorari then pending in this Court (*Pearson* v. *Ecological Science Corporation*, No. 73-596). After Mr. Justice Powell had denied the application, it was resubmitted at Jenny's request to Mr. Justice Douglas, who in turn referred the matter to the full Court, which on April 15 denied the application and simultaneously denied Jenny's motion to intervene in this Court (416 U.S. 933).

After the District Court, by order filed March 1, 1974, had denied Jenny's motion to intervene in that Court, Jenny appealed to the Court of Appeals for the Fifth Circuit and sought an interlocutory injunction, which the Court of Appeals denied on March 13, 1974 (Docket No. 74-1616). Jenny's appeal was subsequently dismissed on July 23, 1974, following defendants' motion to dismiss the appeal for lack of jurisdiction or alternatively as being frivolous and thus dismissable under Fifth Circuit Local Rule 20. The Court of Appeals orders denying an interlocutory injunction and dismissing Jenny's appeal are included at pages 160 and 301, respectively, of the appendix in the Court of Appeals, which has been lodged with the Clerk for the convenience of this Court.

merit, and is no more deserving of plenary consideration by this Court, when tendered by petitioners, who knowledgeably accepted the settlement they now seek to impeach.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANOTHER COURT OF APPEALS.

Petitioners' contention that a conflict of decisions warrants the exercise of certiorari jurisdiction relies upon *Young v. Higbee Co.*, 324 U.S. 204 (1944). *Young*, petitioner contend (Petition at 9-12), compels the conclusion that the settlement in this litigation constituted an impermissible sale of appeal rights by fiduciaries. The Court of Appeals readily and rightly found petitioners' reliance on *Young* "misplaced" in this litigation (8a), since "the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court" (7a).

The rights of the settling parties in *Young*, preferred shareholders of a bankrupt corporation, were found by this Court to be "inseparable" from those of other preferred shareholders (324 U.S. at 209). Any preferential payment to the settling shareholders in *Young* necessarily operated to the detriment of other holders of the same class of securities, in view of the finite fund available to satisfy the claims of all. Moreover, as observed by the Court of Appeals here (8a), the abandonment of the appeal in *Young* was *res judicata* as to the participation of other

preferred shareholders under the plan of reorganization, an effect not present in this litigation, where following the settlement of plaintiffs' individual claims members of the judicially disallowed "class" pleaded in the complaint remained free to assert, and have in fact asserted, independent claims.

Petitioners are no more persuasive in urging that the Court of Appeals' refusal to consider the propriety of dismissal of the derivative claim conflicts with other court of appeals decisions that have corrected errors which were "obvious and clear from the face of the pleadings and record . . . although not raised below" (Petition at 16). No such "obvious and clear" error can be found where, as respondents contended in the Court of Appeals (and would have demonstrated in the District Court had petitioners raised the issue there), "the derivative count was rendered judicially moot in other litigation" (9a). In any event, the reassertion of the derivative count in the *Jenny* action, commenced following the settlement, "will protect the rights, if any, of the corporation" (*ibid.*).

II.

THE PETITION IS UNWORTHY OF CONSIDERATION BY THIS COURT ON ANY OTHER GROUND.

(A) Enforceability of the Settlement.

Two of the five questions presented by the Petition—namely, whether petitioners' acceptance of the settlement was fraudulently procured (Question 4), and whether all conditions precedent to the settlement had been fulfilled (Question 5)—challenge factual determinations which were made by the District Court after an evidentiary hearing (10a-12a) and were affirmed by the Court of Appeals as

supported by "ample evidence" (6a). Certiorari jurisdiction ought not to be exercised to "review evidence and discuss specific facts" idiosyncratic to a particular litigation. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *accord, e.g., Graver Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

(B) Appealability of the Class Action Order.

Petitioners' final contention, that the Court of Appeals erred in declining to review the District Court's earlier interlocutory order denying class action certification, is similarly not worthy of consideration by this Court. The Court of Appeals did no more than recognize the obvious: either the settlement was invalid, in which event the class action determination would remain interlocutory under established precedent in the Fifth Circuit (*e.g., Graci* v. *United States*, 472 F.2d 124 (5th Cir. 1973)); or the settlement was binding, which would extinguish any right of the settling parties to appeal from earlier interlocutory orders. This recognition of the inevitable consequence of settlement is hardly "a fundamental departure from the accepted and usual course of proceedings", much less "a violation of the Federal Rules of Civil Procedure" (Petition at 14).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpt from Brief of Defendants-Appellees (at 20-21) in *Pearson* v. *Ecological Science Corp.* United States Court of Appeals, Fifth Circuit, No. 74-2175:

Since so much has been made by appellants and by the Securities and Exchange Commission in its *amicus* brief (see pp. 7-8, 23) of the settlement's provisions for withdrawal of documents and sealing of the court file, a few further remarks are in order. In proposing these provisions, defendants sought no more than "to cement the reconciliation between the parties to the controversy. . . ." *Ex parte Davidge,* 82 S.C. 97, 63 S.E. 449 (1909). The parties saw no reason to preserve a public record of the scars of battle. When the Commission in successfully opposing defendants' motion to seal the record on appeal pointed out that the weight of authority was against such provisions, defendants advised the Commission (see SEC Br. 8 n.13) that they would agree and would represent to this Court—and do hereby represent—that upon conclusion of the appeal, even if the order dismissing the actions is affirmed, a joint application will be made to the District Court to unseal the file and vacate the authorization for document withdrawal.* (The only reason such application has not already been made is that the pendency of this appeal has removed the jurisdiction of the District Court to act upon the application without this Court's approval—see Fed. R.Civ.P. 60(b); *Ferrell* v. *Trailmobile, Inc.,* 223 F.2d 697, 699 (5th Cir. 1955). Should this Court wish the file to be unsealed and the authorization for document withdrawal vacated by the District Court before the appeal is decided, defendants will immediately so apply to the District Court.)

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* All withdrawn documents were returned to the District Court and have been lodged with the Clerk of this Court as part of the record on appeal.

Order of United States District Court for the Southern District of Florida, Filed November 26, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

No. 71-1058-CIV-PF

CARL M. PEARSON, *et al.*,
Plaintiffs,

vs.

ECOLOGICAL SCIENCE CORPORATION, *et al.*,
Defendants.

Filed
Nov. 26, 1975
Joseph I. Bogart
Clerk U. S.
Dist. Court
Southern Dist. of
Miami, Fla.

ORDER

THIS CAUSE came before the Court upon the following application of the plaintiffs, CARL M. PEARSON, *et al.*:

APPLICATION OF PLAINTIFFS AND DEFENDANTS:
TO UNSEAL THE COURT FILE

The Court having considered the record, it is—

ORDERED AND ADJUDGED that the plaintiffs' application is hereby granted.

DONE AND ORDERED at Miami, Florida this 26th day of November, 1975.

PETER FAY
United States District Judge

cc:
All Counsel